IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

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BP PIPELINES INC., *Petitioner*,

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, BP Pipelines Inc. (BP), respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 29, 1977.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 557 F.2d 775 (5th Cir. 1977) and appears in the Appendix hereto (App. A). The order of the Interstate Commerce Commission (ICC), In-

vestigation and Suspension Docket No. 9164 (Rate Filings) and No. 36611 (Rules and Regulations), June 28, 1977, which was the subject of the Fifth Circuit's review, also appears in the Appendix hereto (App. B). The order of the ICC denying reconsideration of its Order of suspension is set out in Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 29, 1977. A timely Petition for Rehearing was denied on September 8, 1977, and this Petition for Writ of Certiorari has been filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and § 2350(a).

QUESTIONS PRESENTED

(1) Does Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), authorize the ICC to prevent the institution of service, for up to seven months, of a potential interstate oil pipeline common carrier by suspending the initial proposed rates of such carrier, thus abrogating the recognized right of a crude oil pipeline carrier to establish its rates and operating practices in the first instance?

(2) Can the ICC prescribe an interim rate for BP without benefit of a hearing where Section 15(1) of the Interstate Commerce Act, 49 U.S.C. § 15(1), specifically provides that the Commission may only prescribe a rate after a "full hearing"?

(3) Can the ICC properly impose a refund condition on BP's originally filed rate of $6.35 and on BP's Commission-prescribed interim rate of $4.68 where neither rate was an increase over an existing rate and

where Secton 15(7) of the Interstate Commerce Act only authorizes the Commission to attach refund conditions to "increased" rates?

(4) Can the ICC impose a refund condition on BP's Commission-prescribed rate of $4.68 where (a) Section 15(1) of the Interstate Commerce Act only authorizes the Commission to set rates which are reasonable, and (b) this Court has held, in *Arizona Grocery Co.* v. *Atchison, T. & S.F.R. Co.*, 284 U.S. 370 (1932), that reparations are not permitted if the Commission subsequently prescribes a lower rate?

STATUTORY PROVISIONS INVOLVED

Federal Power Act, 16 U.S.C. § 824d.

Interstate Commerce Act, 49 U.S.C. § 1, § 8, and §§ 15 (1) and (7).

Natural Gas Act, 15 U.S.C. § 717c(e).

(The above-cited provisions are set out verbatim in the Statutory Appendix hereto).

STATEMENT OF THE CASE

BP is a corporation organized and existing under the laws of the State of Delaware with its principal offices at 255 California Street, San Francisco, California 94111. BP owns a 15.84% undivided interest in the Trans-Alaska Pipeline System (TAPS). Seven other companies own undivided interests in TAPS.

TAPS consists of a 48-inch crude oil pipeline, running approximately 800 miles from Prudhoe Bay to the ice-free port of Valdez on Alaska's southern coast, and a tank farm and marine terminal at Valdez.

The Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651 *et seq.*, declared that the pipeline should be constructed as expeditiously as possible in order to facilitate the earliest possible delivery of North Slope crude to the American consumer and to promote the national interest. Construction was completed in June, 1977 and the pipeline was available for transportation on July 31, 1977.

BP is utilizing its share of TAPS as an independent common carrier subject to the provisions of the Interstate Commerce Act, 49 U.S.C. § 1 *et seq.* The Act requires common carriers to file tariffs with the Interstate Commerce Commission (ICC) showing all rates, charges, classifications, regulations, and practices for acceptance and shipment of crude oil. 49 U.S.C. § 6. By regulation, initial tariffs must be filed on not less than ten (10) days notice. 49 C.F.R. § 1300.57(e). BP issued its Local Pipeline Tariffs No. 1 (rules) and No. 2 (rates) on June 3, 1977, proposing an initial rate of $6.35 per barrel, effective June 20, 1977. Supplement 1 to ICC No. 2 was issued by BP on June 15, 1977 with special permission of the ICC (77-4069) to postpone the effective date to June 30, 1977. Both Tariffs and the Supplement were filed in compliance with § 6 of the Act and Rule 57 of Tariff Circular 20, 49 C.F.R. § 1300.57.

The Commission, on June 13, 1977, issued a notice of initiation of summary suspension proceedings to consider the TAPS tariffs.

On June 15, 1977, the ICC Bureau of Investigation and Enforcement, the United States Department of Justice, the State of Alaska, and the Arctic Slope Regional Corporation filed protests to the tariffs, alleging

that the TAPS tariffs were unlawfully high and requesting that the Commission suspend each of the tariffs, including that of BP.

BP submitted its response to the petitions of the four protestants on June 22, 1977, asserting that the Commission lacked the authority either to suspend an initial rate or to prescribe an alternate rate without a full hearing. Without taking evidence, the Commission listened to oral argument on June 27, 1977.

On June 28, 1977, two days before the BP rate was to become effective, the Commission ordered that: the initial tariff rates of BP and the other TAPS owners be suspended for the maximum seven month period allowed by 49 U.S.C. § 15(7); the owners be permitted to file "interim" tariffs in specified amounts ($4.68 in the case of BP) which the Commission would not suspend provided the companies attach undertakings to refund if those interim rates were determined to be excessive; and the companies be required to file similar refund undertakings applicable to the suspended initial rates. (App. B).

BP filed a Petition for Review of the ICC Order in the United States Court of Appeals for the Fifth Circuit (No. 77-2412) on July 8, 1977, pursuant to 28 U.S.C. §§ 2343 and 2344, seeking review and reversal of the Commission's decision to suspend BP's rates for seven months, to prescribe the $4.68 interim rate level, and to require a refund condition on such rate. Also, in order to prevent the occurrence of irreparable harm to petitioner resulting from unrecoverable losses in operating revenues, BP filed a motion with the Court of Appeals requesting the Court to enjoin the effectiveness of the Commission's Order preliminary

to the final resolution of the issues presented to the Court. On July 29, 1977, in a split decision, the Court of Appeals found that the ICC did not act outside its statutory authority and dismissed BP's Petition for Review and denied its motion for an interlocutory injunction. (App. A).

In order to initiate service, BP, on July 30, 1977, filed the $4.68 Commission-prescribed tariff.

On August 12, 1977, petitioner filed a motion with the Court of Appeals for a rehearing with the suggestion that the matter be heard *en banc*. The Court denied the motion on September 8, 1977, stating that it did so in order "to enable the parties to seek review before the Supreme Court without further delay." (App. D).

On September 27, 1977, the ICC issued an Order denying a Petition for Reconsideration filed by BP and other parties. (App. C).

REASONS FOR GRANTING THE WRIT

The Decision Below Raises Significant and Recurring Questions, Not Previously Settled by this Court, as to the Scope of the Commission's Authority Under the Interstate Commerce Act.

A. The Fifth Circuit's Interpretaion of the ICC's Suspension Power Under Section 15(7) of the Interstate Commerce Act is in Direct Conflict With the Express Wording of the Statute, its Legislative History, as well as with Administrative and Judicial Interpretations Given to the Similar Statutory Powers of the Federal Power Commission

BP asserted to the Commission and to the Fifth Circuit that Section 15(7) [1] only empowers the Commission to suspend *changes* filed as to the existing rates, i.e., subsequent increases or decreases to a carrier's effective rate schedule. This position reflects the most widely accepted interpretation of the limits on a

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[1] Section 15(7), in pertinent part, states: "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority . . . to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period. . . ."

regulatory agency's authority to suspend followed at the State and the Federal level. This assertion also was based on the standard principle of statutory construction that a statutory provision is to be read in its entirety, and sentences are not to be distorted in order to derive separate and unlikely meanings. In applying this principle both of the above-quoted sentences must be read in its entirety, and sentences are not to be distorted in order to derive separate and unlike meanings. In applying this principle both of the above-quoted sentences must be read together since both sentences are addressed to the same matter, i.e., the Commission's power to suspend certain rate filings. The first sentence uses the words "any schedule stating a new individual or joint rate" while the second sentence uses the words "the proposed change of rate". There is no indication that Congress intended the words "the proposed change" in the second sentence to mean something less than "any schedule stating a new individual or joint rate" referred to in the first sentence. Accordingly, the word "new" in the first sentence appears to be identical in scope to "the proposed change" in the second sentence. Indeed, if "new" had a double meaning, i.e., new (first and only) and new (changed) then the second sentence would have read "*a* proposed change". Therefore, it appears that the definite article "the" identifies the antecedent "new" as having only *one* meaning: "change".

The legislative history of Section 15(7) demonstrates that the Congress and the President were focusing their concern in charting this piece of legislation on the increasing rate levels of the railroads in operation at the time the suspension power was being considered before Congress. For example, President Taft in submitting

his proposal to the Congress requesting that the ICC be given suspension authority recommended:

> [T]hat the Interstate Commerce Commission be empowered whenever any proposed increase of rates is filed, at once, either on complaint or of its own motion, to enter upon an investigation into the reasonableness *of such change*, and that it be further empowered, in its discretion, to postpone the effective date *of such proposed increases* for a period not exceeding sixty days beyond the date when such rate would take effect.
>
> 41 Cong. Rec. 462, January 19, 1910 (Emphasis Added).[2]

Professor Scharfman—the leading commentator on the Interstate Commerce Act—summarized the scope and effect of the Commission's new power to suspend certain proposed tariffs, as follows:

> Without infringing on the ultimate rights of the carriers to initiate rates and charges, this power enabled the Commission to enter upon the regulating process at an earlier stage and thereby to prevent, at the threshold, *rate changes* likely to violate the basic standards of the Act to Regulate Commerce . . . .
>
> 1 Scharfman, The Interstate Commerce Commission, p. 201 (Emphasis Added).

The Fifth Circuit, however, stated:

> The statutory history of the Mann-Elkins Act (1910), which added § 15(7) to the Interstate Commerce Act yields little insight on whether the

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[2] Additional legislative history of Section 15(7) also demonstrates that Congress was addressing itself to the increased escalation of rates by the existing rail carriers of that time. See, 45 Cong. Rec. 6304, 6777, 6778 and 6792.

> ICC is empowered to suspend initial rates since no one seems to have debated or even discussed this specific question. However, our examination of statutes modeled on § 15(7) and of the legislative policy underlying that section convinces us that it was Congress' intention that the Commission have the power to suspend initial as well as changed rates. 557 F.2d at 781.[3]

Section 205(e) of the Federal Power Act (16 U.S.C. § 824d), was modeled after Section 15(7) of the Interstate Commerce Act, and Section 4(e) of the Natural Gas Act (15 U.S.C. § 717c(e)), was written from Section 205(e) of the Federal Power Act.

The original draft of the Federal Power Act was authored primarily by Commissioner Clyde L. Seavey. On March 8, 1935, Commissioner testified before the House Committee on Interstate and Foreign Commerce as to the provisions of Title II of H.R. 5432. In his opening remarks, Commissioner Seavey stated:

> [The bill] is patterned on the regulatory provisions that have already been accepted by this Commission and adopted by Congress in the *Interstate Commerce Act,* and the Communications Act . . . .
>
> Statement of Commissioner Seavey Before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., March 18, 1935. (Emphasis added.)

A comparison of Section 205(e) of the Federal Power Act and Section 15(7) of the Interstate Commerce

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[3] No one debated the issue of suspension of initial tariffs because the Mann-Elkins Act was *only* addressed to changes in existing rail rates, and particularly changes which were rate increases. It was understood by all concerned that such was the purpose of this piece of legislation, therefore, it was not germane to the enactment of this law to argue about initial tariffs.

Act demonstrates that Section 205(e) was virtually copied from Section 15(7). And when Section 4(e) of the Natural Gas Act was drafted it was clearly stated that Section 4(e) was patterned after Section 205(e). This point was made by FPC Solicitor Dozier A. DeVane and Assistant Solicitor Thomas J. Tingley, while appearing before a Subcommittee of the House Interstate and Foreign Commerce Committee, in support of Section 4(e) of the Act. In describing Section 4(e) they stated:

> Except for its application to natural gas companies subject to the jurisdiction of the Commission rather than to electric companies engaged in interstate commerce this section is comparable to Section 205 Part II of the Federal Power Act.
>
> Brief in Support of the Constitutionality of H.R. 11662, Introduced by FPC Solicitor Dozier A. DeVane and Assistant Solicitor Thomas J. Tingley, Before the House Subcommittee of the Committee on Interstate and Foreign Commerce, 79th Cong., 2d Sess., April 2, 1936, at 18.

Mr. DeVane also stated in the course of his testimony:

> [Section 4(e)] is substantially the same as the section on the same subject matter in the Federal Power Act.
>
> Statement of Mr. DeVane, *Id.*, at 28.

Both Section 205(e) and Section 4(e) have their roots in Section 15(7) of the Interstate Commerce Act. A review of all three sections shows that the authority to suspend is couched in the identical operative language. Each statute begins by providing that the suspension power applies to "new" rates and then provides that if the agency investigating the new rate does

not make its decision within the suspension period that the "proposed *change* of rate" will become effective.

For years the FPC has interpreted these two sections as *not* authorizing the Commission to suspend initial tariffs. The regulations adopted by the FPC at 18 C.F.R. § 2.4 provide:

> The Commission approved and adopted on May 29, 1945, the following conclusions as to its powers and suspension of rate schedules under Section 205 of the [Federal Power Act]:
>
> (d) *An initial rate schedule cannot be suspended.* (Emphasis added.)

And 18 C.F.R. § 2.52 further provides:

> The Commission, in approving and adopting the interpretation stated in Section 2.4, applied it also to the suspension of rate schedules under Section 4 of the Natural Gas Act.

The courts have *not* found 18 C.F.R. Section 2.4 or Section 2.52 to be inconsistent with Section 4(e) of the Natural Gas Act or Section 205(e) of the Federal Power Act. *Atlantic Ref. Co.* v. *Pub. Serv. Com. of New York*, 360 U.S. 378 (1959); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Federal Power Com.* v. *Sierra P.P. Co.*, 350 U.S. 348 (1956). The interpretation assented to by this Supreme Court is that the statutory language empowering the FPC to suspend only authorizes it to suspend new rate schedules which are filed as changes to existing schedules. In fact, this Court specifically recognized that Section 4(e) only gave the FPC the power to suspend "newly changed" tariffs. As pertinent, the Court in *Mobile* stated:

> All that Section 4(e) does, however, is to add to this basic power [to set aside or modify rates], in the case of a *newly changed* rate . . . .
>
> 350 U.S. at 341. (Emphasis added.)

The Court recognized that "the [Federal Power] Commission's only power is that which it has under Section 4(e) to set aside the *new* rate if that is found to be unlawful". (Emphasis is the Court's). *Id.* at 340. And, the Court continued by stating that Section 4(e) does not, however, affect the carrier's right to set its initial rate.

> The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act. Id., p. 343.

Additionally, then Tenth Circuit in analyzing Section 4(e) stated:

> [T]he Commission has no initial rate-making powers and an initial rate fixed by contract remains in effect unless and until it is changed or a proceeding under Section 4(d) and (e) or Section 5(a) of the Natural Gas Act.
>
> *Phillips Petroleum Co.* v. *Federal Power Com.*, 258 F.2d 906, 917 (10th Cir. 1958).

The Fifth Circuit itself has confirmed that initial rates are subject to regulation under Section 5 of the Natural Gas Act (15 U.S.C. § 717d), only, not to Section 4. Section 5 of the Act contains no suspension powers but, like Section 15(1) of the Interstate Commerce Act, only permits an investigation. In *Bel Oil Corporation* v. *FPC*, 255 F.2d 548, 554 (5th Cir.), *cert. denied*, 358 U.S. 804 (1958), the Fifth Circuit found:

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> We also conclude . . . [the increased rates] are 'rate changes' subject to Section 4(d) and not an initial rate subject to Section 5(a) of the Act.

The regulatory scheme of Section 5(a) of the Natural Gas Act duplicates that of Section 15(1) of the Interstate Commerce Act. What the Fifth Circuit has said in interpreting the scope of authority conferred by that language in the Natural Gas Act over natural gas pipeline rates would logically govern the interpretation of the same language appearing in the Interstate Commerce Act over oil pipeline rates. The tariff in question here is an initial rate subject only to Section 15(1) of the Interstate Commerce Act, not a rate change subject to a suspension under Section 15(7) of that Act.

Since the Fifth Circuit's decision in this case is the first instance in which the judiciary has had the opportunity to review the ICC's claims of authority to suspend initial rates, the important issues involved should be resolved by this Court. This is especially so because the Fifth Circuit's rationale for its decision: (1) distorts the plain meaning of the statute; (2) ignores the pertinent legislative history which confirms the plain meaning; and, (3) interprets Section 15(7) of the Act by examining other statutes modeled on that Section in a manner which is in direct conflict with prior decisions of its own, the Tenth Circuit, and the Supreme Court.

B. ICC Has No Licensing Authority Over Potential New Pipeline Carriers

The conflict with other decisions which would allow the ICC to suspend initial tariffs under Section 15(7) would mean that the ICC has recognized that it has the power to prevent the initiation of service by a poten-

tial carrier, only permitting the initiation of service when the company adopts any and all conditions which the ICC may wish to impose. This would constitute *de facto* licensing authority which is nowhere provided or contemplated in the Interstate Commerce Act with respect to oil pipelines.

Certainly, Congress did not intend to provide the Commission in Section 15(7) through the guise of evaluating the reasonableness of rates, the effective authority to prevent the operation of crude oil and products pipelines.[4] Since the Interstate Commerce Act does not provide the ICC with authority to license common carrier pipelines, there is serious question as to whether it had jurisdiction over BP to issue the suspension order.

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[4] Moreover, the exercise of such licensing power by the ICC in this instance is also in apparent contradiction with the Trans-Alaska Pipeline Authorization Act (TAPS Act), 43 U.S.C. §§ 1651 *et seq.*, wherein Congress itself found that the construction and operation of the pipeline was in the public interest. Specifically, 43 U.S.C. § 1651(a) provides: "The Congress finds and declares that: (a) the early development and delivery of oil and gas from Alaska's North Slope to domestic markets *is in the national interest* because of growing domestic shortages and increasing dependence upon insecure foreign sources". (Emphasis added.) The TAPS Act, § 1652(b), further provides: "(b) The Congress hereby authorizes and directs the Secretary of the Interior and other appropriate Federal officers and agencies to issue and take all necessary action to administer and enforce rights-of-way, permits, leases, and other authorizations that are necessary for or related to the construction, operation, and maintenance of the trans-Alaska oil pipeline system, including roads and airstrips, as that system is generally described in the Final Environmental Impact Statement issued by the Department of the Interior on March 20, 1972. The route of the pipeline may be modified by the Secretary to provide during construction greater environmental protection."

Section 1 of Part I of the Act, 49 U.S.C. § 1 (the jurisdictional section) provides, as pertinent:

> (1) That provisions of this part shall apply to common carriers *engaged in*
>
> * * *
>
> (b) *The transportation* of oil or other commodity, except by water and except natural or artificial gas by pipelines, or partly by pipelines and partly by railroad or by water.
>
> (Emphasis added.)

"Transportation" in the context of the instant case, means the actual movement of crude oil by BP as a common carrier for a third party shipper. See, *Pennsylvania R. Co.* v. *Public Utility Commission of Ohio,* 498 U.S. 170 (1936); *Southern R. Co.* v. *Prescott,* 240 U.S. 632 (1916); and *Southern R. Co.* v. *Reid,* 222 U.S. 424 (1912).

As pertinent, Section 1(3)(a) of Part I provides:

> The term 'common carrier' as used in this part shall include all pipeline companies . . . *engaged in* such transportation as aforesaid as common carriers for hire.
>
> (Emphasis added).

At the time it filed its initial tariff, and at the time the ICC issued its Order suspending that tariff, BP was not engaged in interstate transportation of crude oil for hire.

In other words, BP apparently was not, at the time of the ICC's Order, a "common carrier" subject to regulation by the Commission.

The Fifth Circuit merely presumed without further analysis that the ICC properly held jurisdiction over BP at the time of the June 28 Order. This question of ICC jurisdiction over pipelines such as that owned by BP is one which should be addressed.

C. The Holding by the Fifth Circuit that the ICC's "Suggested" Maximum Interim Rate Level was not a Legislative Rate Prescription by the ICC Conflicts With the Supreme Court's Decision in *Arizona Grocery Co.* v. *Atchison, T. & S.F.R. Co.*, 284 U.S. 370 (1932), and the Decision of the Court of Appeals for the District of Columbia in *Moss* v. *CAB*, 430 F.2d 891 (D.C. Cir. 1970).

The Commission's basic rate authority is found in Section 15(1) and Section 15(7) of the Interstate Commerce Act. Under Section 15(1) it is authorized to prescribe just and reasonable rates after full hearing. As pertinent, the Fifth Circuit upheld the Commission's actions, admittedly taken without the required hearing, on the basis that the specification of the rate of $4.68 per barrel as the maximum rate at or below which BP would be allowed to engage in business as a common carrier, was not a legislative prescription of a rate but merely a "suggestion".

In *Arizona Grocery* this Court was faced with the contention:

> [T]hat the mere setting of [rate level] limits by Commission order leaves the carrier free to name any rate within those limits. *Id.* p. 386.

The Court was not impressed with the argument that the ICC, by merely setting rate levels, was not acting in a legislative capacity to prescribe rates, stating:

> The prescription of a maximum rate, or maximum and minimum rates, is as legislative in quality as the fixing of a specified rate. *Id.*, p. 388.

In *Moss* v. *CAB*, *supra*, air carriers filed rate increases pursuant to the Federal Aviation Act, 49 U.S.C. § 1482(g) which, like 49 U.S.C. §§ 15(1) and (7), requires a full hearing before a rate may be prescribed.

The CAB held oral argument, entered an order suspending the rates, and specified a formula under which new rates could be filed without suspension. The carriers, confronted with a choice similar to that facing TAPS owners, acceded to the Board's order and filed new tariffs conforming to the Board's formula.

On appeal the CAB argued, as did the ICC, that the alternative offered the carriers was merely advisory, and not a prescription of rates. The Court rejected the Board's specious reasoning and ruled that the threatened use of the power to suspend rates in excess of those derived by the suggested formula constituted economic coercion and prescription of rates by the Board.

The Court said:

> As a practical matter the Board's order amounted to the prescription of rates because, as the Board admits, the pressures on the carriers to file rates conforming exactly with the Board's formula were great, if not actually irresistable.
>
> * * *
>
> It would seem that upon any realistic interpretation this order involved legislative determination of rates by an agency for the future, as described in the *Arizona Grocery* case.
>
> It would be blinking reality to hold, as the Board argues, that the order of September 12 did no more than suspend and initiate an investigation of the rates proposed by the carriers . . . . The Board did all that it could, short of formally styling its order

> as rate-making, to induce the carriers to adopt the proposed rates.
>
> 430 F.2d at 897-98.

In the instant case, the economic coercion imposed on BP was even greater than on the carriers in *Moss*, and the rates prescribed are more injurious since BP had not yet begun operations and had no existing rate to fall back on. See, *SCRAP* v. *United States*, 346 F. Supp. 189 (D.D.C. 1972), *rev'd. on other grounds*, 412 U.S. 669 (1973), wherein the three-judge District Court stated:

> [A] suspension decision which effectively blackmails the carriers into submitting agency-authorized rates is functionally indistinguishable from an agency order setting those rates . . . .
>
> 436 F. Supp. at 197.

Therefore, the holding of the Fifth Circuit that the ICC had not acted in its legislative capacity to prescribe BP's rates creates an unacceptable conflict of court decisions as to what constitutes rate prescription.

D. The Decision of the Fifth Circuit Upholding the ICC's Establishment of BP's Interim Rate Absent a Full Hearing is in Conflict with the Express Wording of Section 15(1) of the Interstate Commerce Act as Well as Relevant Decisions of the Supreme Court and Other Federal Courts.

Under Section 15(1) the Commission may prescribe rates but only after it has conducted a "full hearing", providing an adequate opportunity for all interested parties to present evidence and respond to arguments based on the evidence presented, and has made a determination that the carrier-initiated rate "is or will be unjust or unreasonable or unjustly discriminatory or

unduly preferential or prejudicial . . . ." 49 U.S.C. § 15(1).

No such hearing pursuant to Section 15(1) was held prior to the Commission establishing BP's $4.68 maximum rate level. The only proceeding which took place prior to the June 28 Order was an informal proceeding by the Commission reviewing the arguments of the four complainants and the answers of the eight respondents as to whether or not the Commission should decide to investigate and/or suspend the proposed tariffs of the eight TAPS owner companies. Only *after* the Commission's June 28 Order did any investigation and hearing pursuant to Section 15(1) begin.

The circumstances of the proceeding leading up to the June 28 Order demonstrate that BP was not provided with an adequate hearing. The Commission requested each of the parties to present an explanation of the rate levels to be incorporated in their proposed tariffs. The Commission did not notify the companies that such material had to be so definitive as to sustain a determination of justness and reasonableness, and that the Commission was considering establishing its own rates for BP. The material filed by BP was prepared to conform with the procedures and calculations applicable to oil pipeline tariffs which had been accepted by the Commission for the past 36 years.

Neither BP nor any other party had advance notice that the Commission would consider departing from its long-established approach to rate determination. Nevertheless, on the basis of summary material filed by BP and without taking testimony, or permitting direct or cross-examination, or discovery, the ICC departed from past practice and prescribed BP's rates.

The proceedings underlying the Commission's Order of June 28 were "informal" proceedings conducted under 49 C.F.R. § 1100.200 which do not satisfy the statutorily-mandated *full hearing* required by Section 15(1), which is a prerequisite to the ICC establishing a rate. *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, 671-72 (1963); *North Carolina Natural Gas Corp.* v. *United States*, 200 F. Supp. 745, 749 (D. Del. 1961); *Bison Steamship Corp.* v. *United States*, 182 F. Supp. 63, 67 (N.D. Ohio 1960).

The decision of the Fifth Circuit on this issue, therefore, is in conflict with existing precedent and the express wording of Section 15(1) requiring the ICC to hold a "full hearing" prior to setting a carrier's rates. The issue should be reviewed and resolved by this Court.

E. The Decision of the Fifth Circuit Upholding the Commission's Action Imposing Refund Obligations On the Collection of Both the Interim Rate and the Filed Initial Rate Is in Error.

In its decision issued June 28, 1977, the Commission ordered that the carriers incorporate in their interim tariffs a refund provision to the effect that if the prescribed rates should exceed the rates subsequently authorized by the ICC, the carriers will refund the difference between the rate charged and the rate subsequently authorized; and, the ICC further required that the carriers file similar refund provisions applicable to the proposed original rates.

The ICC cited no statutory authority for the imposition of such refund conditions either in its argument to the Court. The Fifth Circuit, nevertheless, concluded that while they could find no express statutory language empowering the ICC to attach refund

conditions to both tariffs, the power of the ICC to impose refund conditions exists in the form of a "valid corollary to the suspension power". This finding by the Fifth Circuit is without merit and will only serve to obscure the boundaries of the ICC's authority over pipelines. See, *Admiral-Merchants Motor Freight, Inc.* v. *United States,* 321 F. Supp. 353 (D. Colo. 1971), *aff'd.* 404 U.S. 802 (1971).

The resort by an agency to unexpressed "implied" powers to fashion remedies allegedly needed to protect the public interest requires a showing that there is an inadequate remedy under existing common law or statutory authority. No such showing has been made.

The ICC has express statutory authority to attach refund conditions in certain specific limited circumstances, and it has express authority to require reparations. These two express statutory powers define the outer boundaries of the Commission's authority to deal with past rates and charges.

As pertinent, Section 15(7) of the Act provides the Commission with the following authority:

> [B]ut in case of a *proposed increased rate or charge* for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such *increase,* specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such

> portion of such *increased rates* or *charges* as by its decision shall be found not justified.
>
> 49 U.S.C. § 15(7) (Emphasis added.)

BP's initial rate of $6.35 was not a "proposed increased rate or charge" within the meaning of Section 15(7). And the ICC, by compelling BP to file an interim rate of $4.68, which will be superseded on January 30, 1978 by the suspended initial rate, cannot convert that initial rate into an "increased rate" within the meaning of Section 15(7). Therefore, there is no statutory authority to attach a refund condition to either the interim or the initial rate.

Section 8 of the statute, 49 U.S.C. § 8 provides:

> In case any common carriers subject to provisions of this chapter shall do, cause to be done, or permit to be done, any act, matter or thing in this chapter prohibited or declared to be unlawful . . . such carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter together with a reasonable counsel or attorney's fee to be fixed by the Court in every case of recovery which attorney's fee shall be taxed and collected as part of the cost in the case.

This provision of the statute, referred to as the "reparation" provision, authorizes any person, including any shipper, or any person having an interest in the oil shipped, to bring an action before the ICC against each and every carrier if the person claiming injury believes that the rate recovered by the carrier from the transportation of oil exceeded the just and reasonable rate required by the statute. Under Section

8, in the event that the rate charged by the carriers from the commencement of operations on August 1, 1977 until January 30, 1978, when a different rate goes into effect, exceeds a just and reasonable rate for the carriage of oil during that period of time, any person injured as a result of the collection of an unreasonably high rate, has the right to reparations. There has been no showing that this statutory remedy is so inadequate that resort to implied or corollary powers is required. Indeed, the attempted creating of an extra-statutory remedy served another purpose.

The Commission, by imposing a refund condition on the interim rate, has departed from the Section 8 standard for determination of reasonableness based on actual experience, and the Section 15(7) standard based on "typical" conditions which may prevail in a hypothetical future period. Many of the carriers filed Petitions for Reconsideration of the interim rates with the ICC, pointing out that the initial rate filings were made having in mind long-range throughput capacity of the system, and that during the seven month suspension period, volumes transported would be significantly below capacity. BP demonstrated that the interim rates prescribed by the ICC, when applied to actual volumes to be transported through the system, would not recover BP's interest costs, and thus will generate negative returns on equity when standard accounting procedures are applied. The ICC, by Order issued September 20, 1977, denying all Petitions for Reconsideration, stated that the measure of reasonableness of rates applicable to the first seven months of operation would not be the actual volumes transported during that period of time but projected normalized system capacity. Thus, the Commission

has ruled that persons claiming injury as a result of alleged excessive rates need not prove that rates were unreasonable when applied to actual operating experiences during the applicable period. The standard of proof required for reparations under Section 8 has been jettisoned.

Not only has the Commission proposed to apply a totally different standard of proof than that which would have been applicable in a reparation proceeding, it also, by utilization by a refund procedure, proposed to avoid the procedural requirements of the Administrative Procedure Act. A reparation proceeding is an adjudication under § 5 of the Administrative Procedure Act, 5 U.S.C. § 554, and requires a decision by the person who hears the evidence. However, prospective rate-making is treated as "rule making" under the Administrative Procedure Act and, where due and timely execution of its functions imperatively requires the omission of the initial decision of an Administrative Law Judge, the agency has the authority to omit such decision. 5 U.S.C. § 557. Claiming authority under this Section of the Administrative Procedure Act, the Commission, by Order served July 11, 1977, has ordered that the initial decision of the Administrative Law Judge be omitted. (App. E.) Such an omission would be illegal under reparation proceedings.

Thus, the Commission, by invoking an unspecified collateral authority to attach a refund condition to its suspension of an initial rate, proposes to deprive carriers not only of their procedural rights in the review of past rates, but also totally to alter the criteria by which the reasonableness of such rates will be deter-

mined. Such an action is without precedent and should be set aside.

F. The Action of the ICC and the Holding of the Fifth Circuit Conflict With the Supreme Court's Holding in *Arizona Grocery Co. v. Atchison, T. & S.F.R. Co., Supra*, Declaring it Unlawful for the ICC to Order Reparation Payments from a Commission-Made Rate.

In *Arizona Grocery* the ICC, after hearing, issued an order finding that any future rates charged by Atchison above 96.5 cents would be unreasonable and ordered that Atchison charge a rate not exceeding that figure. Atchison complied by filing a rate of 96 cents. Later, Atchison voluntarily reduced its rate to 84 cents. Subsequently, the ICC issued another order modifying its previous order and establishing Atchison's maximum rate level at 71 cents. Complainant shippers sued Atchison for reparations under Section 8 of the Interstate Commerce Act, 49 U.S.C. § 8, for the difference between the rates they paid above 71 cents and below the 96 cent level. The ICC held for complainants and authorized reparations for the difference.

The Court held that refunds of the differences paid by the carrier as reparations between the two ICC-prescribed rate levels was impermissible. The Court reasoned that Section 15(1) of the Interstate Commerce Act only provided the ICC with authority:

> [T]o fix a maximum or minimum *reasonable* rate; for it is precluded by statute from fixing one which is unreasonable, which by the statute is declared unlawful. If it were avowedly to attempt to set an unreasonable high maximum its order would be a nullity. (Emphasis is the Court's).
>
> *Arizona Grocery, supra*, p. 387.

In other words, there could be no reparations for the difference between the first Commission-prescribed rate of 96 cents and the second Commission-prescribed rate of 71 cents inasmuch as the 96 cent rate level was necessarily a *reasonable* rate. As Justice Roberts, in writing for the Court, stated:

> Where the Commission has upon complaint, and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to unreasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate.
>
> Id., p. 390.

In the instant proceeding the Commission has imposed a refund condition on the $4.68 rate level so that in the event it later sets a rate below that level the shippers can receive a refund for the difference in prescribed rate levels. Such action by the Commission clearly conflicts with this Court's decision in *Arizona Grocery, supra.* For the Commission, in establishing BP's $4.68 rate level, necessarily established a reasonable rate under Section 15(1) of the Act from which no refunds or reparations may be had lest the Commission acknowledge that the $4.68 rate level it set was an unreasonable one which would then make its Order a nullity.

CONCLUSION

For these reasons, a *writ of certiorari* should issue to review the judgment and opinion of the U.S. Court of Appeals for the Fifth Circuit.

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DATED: October 12, 1977

Certificate of Service

I hereby certify that the requisite number of copies of the foregoing Petition for a Writ of Certiorari were served this 12th day of October, 1977, by First Class Mail, to all parties of record and:

The United States Attorney
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The Solicitor General of the United States
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All parties required to be served have been served.

/s/ Robert J. Grady

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